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No. 1913

IN THE
Supreme Court of the United States
October Term, *1979*

AAACON AUTO TRANSPORT, INC.,
Petitioner,

v.

JUDITH A. MILLER,
Respondent.

SUPPLEMENTAL AND REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 22.6 of the Rules of this Court, the instant brief addresses an issue raised, but not answered in *Roadway Express, Inc. v. Piper,* __ U.S. __, 100 S.Ct. 2455 (1980) reported since the filing of the original petition for a writ of certiorari. It raises a matter of first impression with this Court, namely, whether an award of attorneys' fees for alleged obstructive behavior should be limited to the excess attorneys' fees attributable to said behavior; or whether the award should encompass the attorneys' fees for the entire litigation. Petitioner has no objection to respondent filing a further reply thereto should this Court deem it necessary or proper.

Further, the instant brief replies to the brief in opposition of respondent and corrects errors and omissions in the statement of facts by respondent concerning the proceedings below, to avoid leaving this Court with incorrect impressions.

I

THE AWARD OF ATTORNEYS' FEES WRONGLY EXCEEDED BEYOND THE "EXCESS" COSTS DUE TO ALLEGED OBSTRUCTIVE BEHAVIOR.

In the instant case the District Court held Aaacon's behavior concerning its motion for arbitration to be obstructive. Regardless of the correctness of that finding which is refuted herein below, the District Court erred in awarding plaintiff attorneys' fees of $25,000—covering the entire litigation, despite Aaacon's motions to limit the award of fees to the alleged obstructive behavior.

The Supreme Court of the United States in its recent decision in *Roadway Express, Inc. v. Piper,* __ U.S. __, 100 S.Ct. 2455 (1980) has specifically left open the question of whether an award of attorneys' fees, where appropriate, are awardable for the entire litigation, or solely for that portion of the litigation attributable to any vexatious or dilatory conduct. Mr. Justice Blackmun in his concurrence noted:

> "The Court does not explore the specific features of this exception [to the law permitting awards of attorneys' fees]. Most significantly, it does not address the permissibility of applying this new exception toward attorneys' fees beyond those actually attributable to the culpable attorney's vexatious actions (i.e., 'excess costs' under Sec. 1927). Like the Court, I am willing to let this issue be considered in the first instance on the remand." Footnote 2. (Bracketed langauge added.)

Accordingly, the instant case is one of first impression on this issue.

As argued in petitioner's petition for a writ of certiorari, Congress has precluded awards of attorneys' fees

for vexatious conduct in cases arising under the Carmack Amendment, 49 U.S.C. Sec. 11707. However, should attorneys' fees be awardable in such cases, fees *should be limited* to those hours of additional work caused by defendant's allegedly vexatious conduct. As the United States Supreme Court noted in *Roadway Express, Inc. v. Piper,* __ U.S. __, 100 S.Ct. 2455 (1980):

> ". . . because such fees are shielded from direct democratic controls, they must be exercised with restraint and discretion."

In recognition of this limitation, federal courts have uniformly held that attorneys' fees awarded by virtue of such inherent power must be confined to fees incurred for those hours of additional work specifically caused by the opposing counsel's vexatiousness. In *Wright v. Jackson,* 522 F.2d 955, 958 (4th Cir. 1975), this Court held that:

> "An award of obstinacy, though a penalty, should cover only the unnecessary effort occasioned by the obstinacy (Citations omitted) . . . no matter how obdurate defendants may have been, for example, in their refusal of performance, which led, in fact, to a finding of contempt, *this cannot justify an assessment for a previous part of the case in which no obstinacy occurred.* Accordingly, even though some bases for the district court's awards survive our previous disposition, we must remand for a recomputation, limited to an assessment of the extent to which plaintiffs were burdened by defendant's obstinate conduct." (Emphasis added.)

Similarly, in *Carillo v. Westbulk,* 514 F.2d 1214, 1220 (1st Cir. 1975), the Court asked:

> "[S]hould the plaintiff receive his counsel fee for the entire case, including those claims which the adverse party was not obstinate in resisting? We have indicated otherwise.

See *Pan American World Airways, Inc. v. Raymos,* 1 Cir., 1966, 357 F.2d 341, 342."

Finally, in *Signal Delivery Service, Inc. v. Highway Truck Drivers & Helpers, Local No. 107,* 68 FRD 318, 322 (D.C. Pa. 1975), counsel fees were awarded only in so far as such fees were incurred in one particular phase of litigation:

> "The Clerk of Court found that the defendants acted in bad faith, vexatiously, wantonly and for opressive reasons and on this basis concluded that the plaintiff was entitled to attorneys' fees. *We do not, however, concur* with this finding that the conduct of the defendants warrants *shifting to them the entire amount of attorneys' fees* incurred by the plaintiff in this litigation." (Emphasis added.)

Thus, even if Aaacon's conduct were obstructive, it would appear from the decisions of lower courts and the analogous language in 28 U.S. Code Sec. 1927 that only "excess" attorneys' fees necessitated by vexatious conduct should be awarded. This would avoid a punitive multiplication of attorneys' fees beyond the damage caused by the vexatious party. See *Roadway Express, Inc. v. Piper, supra,* slip opinion, p. 3, footnote 3.

Respondent herself acknowledges, p. 11 of the brief in opposition, that the attorneys' fees award *should* be limited to the "expanded unnecessary expense" which Aaacon's alleged actions caused. Attorneys' fees should not be awarded for the entire amount of the entire litigation as the District Court below did.

However, no limitation of attorneys fees was observed in the instant case and, as heretofore noted, the decision in *Roadway, supra,* leaves the matter unarticulated. Accordingly, it is appropriate for review by this Court at this time.

II

ERRORS IN FACT

Respondent errs in its suggestion that the Interstate Commerce Commission had rejected the tariff provision of Aaacon Auto Transport, Inc. authorizing arbitration, and its supposition that the use by Aaacon of the arbitration provision was done in contravention of such a tariff rejection. The facts are that an employee of the Commission had rejected the arbitration provision in 1971. However, the following year, 1972, the Commission *accepted* for filing the tariff provision authorizing arbitration. From that period of 1972 through 1976, the provision authorizing arbitration was part of Aaacon's bill of lading agreement and tariff lawfully on file with the Commission, having the effect and force of a federal statute. *Louisville & N.R. Co. v. Maxwell,* 237 U.S. 94. It was in effect when the cause of action herein arose and when Aaacon moved before the District Court for a stay of litigation pending arbitration in 1974.

Second, respondent errs in suggesting that at the time of the District Court's decision there was a uniform body of law rejecting the arbitration provision as unlawful. The facts are that the Third Circuit Court of Appeals in *Aaacon Auto Transport, Inc. v. Jacobson,* 475 F.2d 1394 (3rd Cir. 1973) had upheld and enforced the arbitration provision which was at issue in the District Court. It is currently the law in the Third Circuit.

Accordingly, there was no uniform body of law rejecting arbitration. Rather, there was a split in the Circuits. At the time of the motion and subsequent hearing the Fifth Circuit had not ruled the issue. Accordingly, pursuant to the code of Professional Responsibility DR7 106(b)(1) and EC 723 there was no controlling law nor was there any duty on the part of Aaacon's counsel to bring this split in the Circuits before the Fifth Circuit.

Third, petitioner had no duty to bring the issue of validity of the arbitration provision to the Court's attention because the matter was res judicata. The fact is that when the case was removed to the Federal District Court in 1974, Aaacon moved

for a stay of litigation pending arbitration. The District Court granted the stay, specifically finding:

> "It does not appear that there was a contract of adhesion or that there was anything unreasonable about this (arbitration) clause . . ." (Bracketed language added.) See Appendix 1 to this reply.

Respondent moved for reconsideration of the Court's stay pending arbitration and reconsideration was denied.

Miller then attempted to defeat jurisdiction by amending the complaint which the District Court also rejected. Thereafter, the parties were unable to agree on how to move the matter into arbitration. The Court sua sponte determined that the delay in arbitration was too long and vacated the stay placing the matter back in litigation. Aaacon appealed this vacatur and the Fifth Circuit Court of Appeals sustained Aaacon's appeal. It remanded the matter to the District Court to determine who was at fault for the delay.

Thus, the sole issue before the District Court upon remand was fault for delay. Yet the District Court in determining the fault for delay *also* found the arbitration provision unlawful based on *Aaacon Auto Transport, Inc. v. State Farm,* 537 F.2d 648 (2d Cir. 1976). It villified Aaacon's counsel for not bringing the *State Farm* decision to its attention. It ignored the fact that the validity of arbitration was the law of the case, having been earlier found by the District Court to be "lawful and proper." It ignored the fact that the only issue on remand was the question of who was at fault for delay. It also ignored Aaacon's contention that there was a split in the Circuits—the Third Circuit having found the provision lawful and enforceable.

The sole basis for a finding of "vexatious" conduct has been this alleged failure of Aaacon's counsel to cite the *State Farm (Romagnoli)* case, representing a split in the Circuits, on an issue not before the District Court at the time.

A fourth error in respondent's facts is the issue of Aaacon's motion before the Eastern District of New York for an order enforcing arbitration. Such a motion was proper. It was made *prior* to any rejection by the Florida District Court of arbitration. Further, the motion before the Eastern District of New York was made under a separate section of the Federal Arbitration Act, 9 U.S. Code Sec. 4. Section 4 of the Federal Arbitration Act is separate and distinct from Section 3 of the Act under which the order in the Florida Federal District Court had been heard. They are *not mutually exclusive. In Re Pahlberg,* 131 F.2d 968 (2d Cir. 1942). Further the Federal Arbitration Act is written so that motions under Section 4 *must* be made in the District in which arbitration is to be held—herein New York. *Continental Grain Co. v. Dant & Russel,* 118 F.2d 967 (9th Cir. 1941). Clearly no wrongful conduct from the separate motions is attributable to Aaacon.

Fifth, the recitation of facts by respondent omits the fact that respondent had sought claim in litigation for $100,000 in actual damages. The total award was 2½% of that—$2,500. Yet on top of that award, the District Court awarded $25,000 attorneys' fees. The District Court did not award attorneys' fees for merely a *part* of the case which it felt was due to Aaacon's alleged dilatory actions or bad faith. Rather, the District Court awarded attorneys' fees for the entire litigation.

In other words, the District Court opinion here under review awarded attorneys' fees for every part of the litigation. Yet the obstruction alleged was limited solely to the delay caused by the attempted enforcement of the arbitration provision. It is this limited delay for which attorneys' fees should have been awarded, if attorneys' fees are properly awardable at all. The argument by respondent, that arbitration limited Aaacon's liability and was, therefore "reprehensible" conduct justifying attorneys' fees, finds no rationale at law. Nor was it a basis of the decision by the District Court. In fact, the Congress of the United States recently amended the Interstate Commerce Act to specifically permit carriers to limit their liability completely. 49 U.S. Code Sec. 10730. Thus the conduct which respondent

would label "reprehensible" has now been authorized and encouraged by the Congress of the United States and, further encouraged by regulations published by the Interstate Commerce Commission, 49 CFR 1137.10 et seq.

Further, unlawful clauses in carriers' bills of lading have historically been rejected by this Court as a basis to award attorneys fees. *Atlantic Coastline v. Riverside Mills,* 219 U.S. 207 (1911).

III

THE RESPONDENT HAS NOT DEALT WITH THE ABSENCE OF AUTHORITY OF THE DISTRICT COURT TO AWARD ATTORNEYS' FEES

Aaacon has noted in its petition to the Court that Attorneys fees are not awardable under Section 8 of the Interstate Commerce Act because that Section does not apply to motor carriers—such as petitioner. *T.I.M.E. Inc. v. U.S.,* 359 U.S. 464 (1958). Moreover, cases involving claims for damage to goods transported by an interstate carrier, such as the instant case, have always rejected attorneys' fees. *T.I.M.E.—D.C., Inc. v. Southwestern Historical War Museum,* 528 S.W.2d 901 (Tex. Civ. App. 1975); *Sutherland v. Ringsby Truck Lines, Inc.,* 549 P.2d 784 (Colo. App. 1976); *Humphrey Feed & Grain v. Union Pacific R.R. Co.,* 257 N.W.2d 391 (S. Ct. Neb. 1977).

Further, respondent has not dealt with the fact that the statutory provision under which the litigation herein was brought in the District Court, 49 U.S. Code Sec. 20(11), now 49 U.S. Code Sec. 11707 provided an exclusive measure of damages is provided, no attorneys fees are awardable even under the Court's equitable power:

> "These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, *unless forbidden by Congress.*
>
> * * *

> "Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are *matters for Congress to determine.*
>
> * * *
>
> "*Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others.* But it would be difficult indeed for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." (Emphasis supplied.)

Alyeska Pipelines Service Co. v. Wilderness Society, Inc., 421 U.S. 240, 259, 262-264 (1975). Accord: *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190 (1916); *Missouri Pacific v. Rouw Co.*, 258 F.2d 444 (5th Cir. 1958).

As stated in *Hall v. Cole*, 412 U.S. 1, 1973:

> "This does not end our inquiry [on attorneys' fees], however, for even where 'fee-shifting' would be appropriate *as a matter of equity, Congress has the power to circumscribe such relief* (emphasis and bracketed language added). Id. at 9."

Accord: *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719, 720 (1967). Accordingly, attorneys' fees are not awardable in the instant case because Congress has provided the exclusive measure of damages in enacting 49 U.S. Code Sec. 20(11).

For the foregoing reasons it is respectfully submitted that two important issues should be resolved by this Court at this time:

1. whether attorneys' fees are awardable where a statute provides the exclusive measure of damages; and

2. whether under the *Roadway* decision, attorneys' fees, if awardable, are limited to the excess attorneys' fees caused by

the vexatious conduct or, whether as the District Court below held, attorneys' fees should be awarded for the entire litigation when there is vexatious conduct on the part of the party.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Southern District of Florida.

Respectfully submitted,

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APPENDIX "1"
ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JUDITH A. MILLER,

Plaintiff,

vs.

AAACON AUTO TRANSPORT, INC.,

Defendant.

THIS CAUSE is before the court on defendant's motion to stay litigation pending arbitration. This case was originally filed in the circuit court of the seventeenth judicial circuit, Broward County, Florida, and was removed to this court pursuant to the terms of 28 U.S.C. §§1441 and 1445(b). Plaintiff's complaint alleges that her automobile was damaged while in the possession of defendant for purposes of transporting it from California to Florida. Prior to shipment, the parties entered into a bill of lading agreement, a copy of which has been supplied to the court. This agreement provides, in part, that "Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or performance or breach thereof shall be settled by arbitration in New York City."

The court is of the opinion that plaintiff's claim for damages to her car is covered by this arbitration clause. It does not appear that this was a contract or adhesion or that there was anything unconscionable about this clause which would prevent a court from giving effect to it. Since plaintiff has not filed a

response to defendant's petition to stay litigation pending arbitration, the court has no way of knowing whether plaintiff has any valid defenses to the enforcement of this contract. It is well settled, however, that arbitration clauses are to be liberally construed and all doubts resolved in their favor. *Scherk v. Alberto-Culver Co.*, 94 S.Ct. 2449 (1974). It is, therefore,

ORDERED AND ADJUDGED that trial of this action is stayed until arbitration has been had, providing defendant does not hereafter default in proceeding with such arbitration.

It is further ORDERED AND ADJUDGED that counsel for defendant shall advise the court in writing as to the status of arbitration six months from the date of this order.

DONE AND ORDERED this 10th day of September, 1974.

s/Norman C. Roetgen
United States District Court Judge

CC: MORGAN, CARRATT and O'CONNOR
Steven Fine, Esq.